## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 1:05CR00053
	)	Cuse 110. 1.05 CITO 0055
V.	)	OPINION
	)	
MARJIL LEE BERGARA,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	_

Marjil Lee Bergara, Pro Se Defendant.

The defendant, a federal inmate proceeding pro se, has filed a pleading in this long-closed case, seeking relief from the criminal judgment entered against him, which ordered him to pay his victim substantial restitution. For the reasons stated, I find that Bergara's motion must be construed as a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C.A. § 2255 (West Supp. 2012), and dismissed as successive.

Bergara styles his submission as a "Motion on the New Ruling Pass[ed] by the Supreme Court," referring to *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012). In *Southern Union*, the Court held that any fact which increases a criminal defendant's maximum potential fine must be submitted to the jury rather than determined by the court at sentencing. *Id.* at 2357 ("We hold that the rule of *Apprendi* applies to the imposition of criminal fines.") Bergara pleaded guilty pursuant to a plea agreement by which he stipulated to having caused losses in excess of \$200,000. (Plea Agreement, ECF No. 27, ¶ 5.) Because I construe Bergara's motion as seeking to overturn the judgment based on that plea agreement stipulation, I also construe his motion as a § 2255 motion.

Bergara has previously pursued relief under § 2255. In 2007, Bergara filed a § 2255 motion, among other claims asserting that the 180-month sentence imposed upon him exceeded the maximum sentence authorized by that section. Finding this assertion to be correct, I granted relief as to this claim and entered an Amended Judgment, but denied relief as to all Bergara's other § 2255 claims. Bergara filed a second § 2255 Motion in 2008. I denied relief, finding that Bergara's sentence in the Amended Judgment did not exceed the statutory maximum and that his remaining claims were barred as successive under § 2255(h).

This court may consider a second or successive § 2255 motion only upon specific certification from the United States Court of Appeals for the Fourth Circuit that the claims in the motion meet certain criteria. See 28 U.S.C.A. § 2255(h). Because the defendant offers no indication that he has obtained certification from the court of appeals to file a second or successive § 2255 motion, I must dismiss his current action without prejudice.

<sup>&</sup>lt;sup>2</sup> See Bergara v. United States, No. 7:07CV00071, 2007 WL 750547 (W.D. Va. Mar. 8, 2007), judgment vacated by 2007 WL 1097859 (W.D. Va. Apr. 11, 2007), and reconsideration denied by 2007 WL 2572332 (W.D. Va. Sept. 6, 2007).

<sup>&</sup>lt;sup>3</sup> United States v. Bergara, No 1:05CR00053, 2008 WL 5245392 (W.D. Va. Dec. 17, 2008), appeal dismissed, 332 F. App'x 150 (4th Cir. 2009), cert. denied, 130 S. Ct. 1560, petition for rehearing denied, 130 S. Ct. 3538 (2010).

A separate Final Order will be entered herewith.

DATED: July 23, 2012

/s/ James P. Jones
United States District Judge